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No. 91-1433

Supreme Court, U.S.
FILED
APR 7 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL INC.,

Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
and KENNETH R. FORD,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Public Service Authority, as an arm of the State of South Carolina, is subject to the district courts' jurisdiction over actions "between citizens of different States."[1]

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[1] Pursuant to Rule 29.1, respondents state that the South Carolina Public Service Authority is an agency and arm of the State of South Carolina. *See* S.C. Code §§ 58-31-10 to 58-31-450.

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Petition For A Writ Of Certiorari
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the South Carolina Public Service Authority ("SCPSA") and Kenneth R. Ford, SCPSA's President and Chief Executive Officer, respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished *per curiam* order of the United States Court of Appeals for the Sixth Circuit in Case Nos.

91-5251/6052 appears in Appendix A of the Petition for a Writ of Certiorari, at 1a-2a.

The unpublished order, judgment, and memorandum opinion of the United States District Court for the Eastern District of Kentucky in Civil Action No. 90-246 appear in Appendices C, D, and E of the Petition, at 3a-10a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered its judgment on December 9, 1991, and the Petition for a Writ of Certiorari was filed within 90 days thereafter. No petition for rehearing was filed.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1332, which is reproduced in Appendix E to the Petition, at 9a-10a, and S.C. Code §§ 58-31-10 to 58-31-450, reproduced in Appendix F to the Petition, at 11a-43a.

STATEMENT OF THE CASE

On November 21, 1990, respondent SCPSA, an agency of the State of South Carolina, filed a civil action in the Court of Common Pleas of Berkeley County, South Carolina (No. 90-CP-08-1760). That suit concerns the corruption of Joe C. Norman (now deceased), who until 1989

was SCPSA's vice president.[2] SCPSA's state court complaint, as amended, alleges that Mr. Norman was induced to betray SCPSA through payment of cash and valuables by Clyde E. Goins and two corporations of which Mr. Goins was president, Great Western Coal Inc. and Great Western Coal (Kentucky), Inc. (collectively "Great Western"), the petitioners herein. The amended complaint makes claims under state law against Great Western and against Mr. Norman and Mr. Goins for breach of Mr. Norman's fiduciary and contractual duties, inducement of that breach, fraud, and civil conspiracy.

Instead of responding to SCPSA's complaint, Great Western commenced the present action in the United States District Court for the Eastern District of Kentucky against SCPSA and its President and Chief Executive Officer, Kenneth R. Ford, in his official capacity. Great Western contended that SCPSA should be compelled to arbitrate its state court claims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, because of commercial arbitration provisions in two coal purchase contracts. Because the FAA does not independently confer federal jurisdiction,[3] Great Western alleged that there

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[2] On September 11, 1991, an indictment was returned against Mr. Norman in federal court in Columbia, South Carolina, for offenses related to SCPSA's corruption claims. Mr. Norman died on February 2, 1992, the week before his trial on that indictment was to begin.

[3] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).

was diversity of citizenship between it and SCPSA.[4] Great Western moved for a preliminary injunction to bar SCPSA from proceeding with any claim against any of the four defendants in its South Carolina action, and to compel SCPSA to arbitrate its dispute with all of them.

SCPSA moved under Fed.R.Civ.P. 12(b)(1) to dismiss Great Western's federal complaint for lack of subject matter jurisdiction. SCPSA contended that diversity of citizenship was lacking because SCPSA, as an arm of the State of South Carolina, is not a citizen of that State. SCPSA also opposed the motion for a preliminary injunction.

In an oral ruling at the hearing on these motions on January 18, 1991, Chief Judge Eugene E. Siler, Jr., denied the motion for a preliminary injunction. Judge Siler confirmed his ruling in a written order of January 24, 1991. Great Western appealed to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the district court on August 28, 1991, granted SCPSA's motion to dismiss. Judge Siler's memorandum opinion noted that numerous state and federal decisions from South Carolina have held that SCPSA is an arm of

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[4] Great Western states that "[i]t is undisputed . . . that [SCPSA] is incorporated in South Carolina with its principal place of business in that State . . . . " Petition, at 3 n.5. SCPSA has maintained consistently in this litigation that it is not a private corporation nor analogous to one, but is an arm and alter ego of the State of South Carolina. The statute creating SCPSA designates it "a body corporate and politic," S.C. Code § 58-31-10, and it is subject to none of the registration requirements applicable to domestic corporations in South Carolina.

the State.[5] After his own analysis of SCPSA's standing as the "arm" or "alter ego" of the State of South Carolina, Judge Siler concluded that there is no federal jurisdiction. Petition App., at 7a-8a.

Great Western appealed the August 28 order, and the two appeals were consolidated before the Sixth Circuit.

After Judge Siler denied a preliminary injunction in January 1991, Great Western, joined by Messrs. Norman and Goins, moved in the South Carolina Court of Common Pleas to dismiss SCPSA's claims and compel arbitration. Great Western's arguments echoed the arguments that it had made in its federal action in Kentucky. The South Carolina Court of Common Pleas on September 4, 1991, denied *in toto* the defendants' motions to compel arbitration. Great Western and the other state defendants

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[5] For example, the South Carolina Supreme Court has held that SCPSA is not subject to regulation (as is a private utility) by the South Carolina Public Service Commission, for SCPSA "is, in effect a State agency just as the Public Service Commission is . . . . " *South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777, 786 (1949). In another case that Judge Siler cited, the state Supreme Court declared that SCPSA "is completely identified with the State in the performance of its public functions, which are unquestionably of a governmental character." *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 138-39 (1950). Since 1951, the federal courts in South Carolina have held that SCPSA is an arm of the State, not subject to diversity jurisdiction, and sharing in the state's Eleventh Amendment immunity. *Dupont v. South Carolina Public Service Authority*, 100 F. Supp. 778 (E.D.S.C. 1951).

have appealed that decision to the South Carolina Supreme Court.[6]

On December 9, 1991, the Sixth Circuit affirmed the dismissal of Great Western's federal action "for the reasons stated by the District Court Judge Eugene E. Siler, Jr. in his Memorandum filed August 28, 1991." Petition App., at 2a.[7] Great Western's certiorari petition seeks review of this decision.

Judge Siler's August 28, 1991, memorandum sets forth a number of facts showing that SCPSA is an

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[6] The parties' briefs and the record have been filed. The parties have been notified that the case likely will be heard during May 1992.

[7] The relevant circumstances of this case are comparatively simple and are described above. Nonetheless, Great Western has fought strenuously to avoid resolution of SCPSA's claims in the South Carolina state courts, and the dispute between it and SCPSA has become quite complex as a result. Great Western's counter-initiative against SCPSA after SCPSA filed its tort claims in the Court of Common Pleas has included two federal complaints for injunctions against the state court proceedings in two district courts and three appeals by Great Western, in the courts of appeals for the Fourth and Sixth Circuits. Great Western also has taken three interlocutory appeals to the South Carolina Supreme Court – presenting the same issues that it has attempted to litigate in the federal courts. Two of those appeals are currently pending in the South Carolina Supreme Court.

Great Western's certiorari petition presents a one-sided and misleading account of these other facets of the dispute between it and SCPSA, but these other circumstances are largely irrelevant to the single issue on which Great Western seeks certiorari. To date, no court, federal or state, trial or appellate, has found or adopted either the "facts" or the "law" from which Great Western fashions the account presented in its petition.

instrumentality of the State, serving important state-wide purposes. Petition App., 7a-8a. SCPSA operates throughout the State, S.C. Code § 58-31-10, "for the benefit of all the people of the State, for the improvement of their health and welfare and material prosperity . . . . " § 58-31-80. SCPSA develops rivers for commerce, navigation, production, and electric power. It acquires and sells water, reclaims land, and reforests watersheds and rivers. § 58-31-30. Like other state entities, SCPSA may condemn land, *id.*, and it enjoys tax exemption. § 58-31-80.

SCPSA is designated as a "body corporate and politic," § 58-31-10, but it is intricately intertwined, both politically and financially, with the State. SCPSA's Board of Directors are appointed by the Governor with the advice and consent of the state Senate, from each congressional district, specified counties, and the State at large. § 58-31-20. The Board of Directors reports to an Advisory Board consisting of the Governor, Attorney General, Treasurer, Comptroller, and Secretary of State. *Id.* The Governor must submit to the General Assembly an annual report including a financial statement and audit of SCPSA's operations. *Id.* SCPSA submits its annual budget to the House Ways and Means Committee for printing "as a regular part of the General Appropriation Act," § 58-31-400, and SCPSA's net earnings are paid semi-annually to the general fund of the State. § 58-31-110.

In its petition for certiorari, Great Western now contends that SCPSA has an "essentially local character," Petition, at 9, but in the district court Great Western conceded that SCPSA's responsibilities are state-wide. Respondents have attached hereto as Appendix A the

affidavit of the Honorable Carroll A. Campbell, Jr., Governor of the State of South Carolina, which they submitted to Judge Siler. Governor Campbell attested that SCPSA serves "State-wide public purposes." App. A, at 1a. At the January 18, 1991, hearing before Judge Siler, counsel for Great Western said, "We don't take much issue with what the governor says in that affidavit on issues of fact." (Tr. Jan. 18, 1991, at 49) Instead, Great Western argued that the facts did not show SCPSA to be an arm of the State.

Great Western's certiorari petition cites the fact that SCPSA's direct electric service area lies within 3 of the 46 counties in the State. Petition, at 9 (citing S.C. Code § 58-31-330). SCPSA's responsibilities, however, include the transmission of electricity to the 35 counties of the Central Electric Power Cooperative, Inc. *See* § 58-31-320. To accomplish its mission, SCPSA operates an integrated transmission system spanning more than 75 percent of the State's geographic area, and including some 3,647 miles of lines that SCPSA owns or leases. *See South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949) (upholding SCPSA's right to maintain and operate transmission system and sell to Cooperative's membership).

Great Western's petition also cites the fact that SCPSA's duty to develop rivers and reforest watersheds, among other functions, extends only to the Santee, Cooper, and Congaree Rivers. Petition, at 9 & n.12 (citing § 58-31-30). But "[o]f South Carolina's three major river systems, the largest is the Santee. It and its tributaries in the Piedmont and Blue Ridge drain nearly 40 percent of the state's total area." C. Kovacik & J. Winberry, South

CAROLINA: THE MAKING OF A LANDSCAPE, 27 (1989). SCPSA's responsibilities for this river system are not merely local.[8]

In sum, SCPSA's responsibilities are state-wide.

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[8] When the South Carolina General Assembly established SCPSA in the midst of the Great Depression, SCPSA's principal task was the completion of the Santee-Cooper Project. *See* S.C. Code § 58-31-160. The Project, which SCPSA operates to this day, is a vast inland waterway and hydroelectric project, intended to promote economic progress and rural electrification throughout the State, as well as provide recreation and foster conservation. As one early account explained, the Santee-Cooper Project utilizes "Carolina's greatest watershed, including the Catawba, Broad, Wateree, Pacolet, Saluda, Enoree, Tyger, Congaree and other great rivers that converge into the Santee . . . . " J. Ziegler, *The Santee-Cooper Project*, SOUTH CAROLINA MAGAZINE, at 36-38 (Mar. 1945), *reprinted in* SOUTH CAROLINA: A DOCUMENTARY PROFILE OF THE PALMETTO STATE, at 606 (E. Johnson & K. Sloan, eds., 1971).

The same writer described the state-wide significance of the Santee-Cooper Project:

> For the first time in the history of the State we are developing adequate power in the coastal regions in close proximity to our harbor and shipping facilities. This development means much to South Carolina. It is rapidly becoming the motivating force of inevitable industrial expansion which is being felt not only in the tide-water regions, but throughout the State. Already new industries are pointing the way to other newcomers, as they recognize and advertise the unusual advantages which South Carolina offers. . . .

Id. at 607.

SCPSA is known as "Santee Cooper" because of its identification with the Santee-Cooper Project.

REASONS FOR DENYING CERTIORARI

I. THIS CASE IS MOOT.

Even if there were need to revisit the "arm of the State" test from *State Highway Comm'n of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929), which this case involves, this case is not the right vehicle for that reexamination.

The South Carolina Court of Common Pleas has rejected the same arbitration claim that Great Western made in this federal action. The state court's decision is res judicata, and it makes this action moot. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court held that under exactly these circumstances, the federal courts could proceed no further with an action under the Federal Arbitration Act. Once a state trial court had decided the arbitrability of the dispute, "the state court's judgment on the issue would be res judicata," and "there would be no further litigation in the federal forum" on the same issue. *Id.* at 10.

Even if there were diversity between SCPSA and Great Western, "there [could] be no further litigation in the federal forum" on Great Western's arbitration claim.

II. THERE IS NO NEED FOR REEXAMINATION OF THE TEST FOR DETERMINING WHICH ENTITIES ARE "ARMS OF THE STATE."

"There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction." *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) (citing *Postal Telegraph*

Cable Co. v. Alabama, 155 U.S. 482, 487 (1894)). Moreover, no state agency or other state entity may be sued as a "citizen" of the State that created it, unless the entity is so independent that it is not the State's "arm." *State Highway Comm'n of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929). There the Court ruled that the State Highway Commission could not be haled into a district court under diversity jurisdiction, for the State "act[ed] through the highway commission," which "was but the arm or alter ego of the state." *Id.* at 199. Because the State clearly was acting through the commission, the Court found that the commission's power to sue and be sued was irrelevant. *Id.*

This case involves the *Wyoming Highway Commission* "arm of the State" test. The courts below applied this test just as it has been applied in numerous other decisions.

This Court has said repeatedly in the Eleventh Amendment context that whether an entity is an arm of the State involves "questions of fact and state law," *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982), especially "the nature of the entity created by state law." *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).[9] No single factor is likely to be determinative, such as whether the agency is a "body corporate," or is otherwise empowered "to sue and be sued." *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam). "[T]he court must look to any and all available

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[9] *See* Petition, at 12 n.15 ("virtually the same analysis" used in Eleventh Amendment "arm of the State" cases as in diversity cases).

sources for guidance." Often, "some factors will suggest that the agency is a 'citizen' while others will just as strongly suggest that the agency is merely an alter ego of the state." In that circumstance, "[t]he court must balance these [factors] against each other . . . . " *Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131, 1132-33 (5th Cir. 1983). The ultimate questions are whether "the entity . . . is so intricately intertwined with the State that it can best be understood as an 'arm of the State,' " or, alternatively, whether "the State, though not a nominal party, is the real party in interest." *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1876 (1990) (Brennan, J., concurring).

Decisions applying this Court's "arm of the State" test are necessarily fact-specific. A number of cases have identified factors that might be relevant. But no detailed code of instructions could eliminate the need for the courts to exercise their judgment by weighing competing factors – precisely as the lower courts did in this case. There is no reason for the Court to grant certiorari to address again this issue.

Great Western nonetheless maintains that certiorari should be granted because of an alleged conflict between the decision of the Sixth Circuit in this case, and this Court's decision in *Moor v. County of Alameda*, 411 U.S. 693 (1973). Petition, at 6-11. Great Western also alleges that the lower courts applying the "arm of the State" test have produced a "confusing hodge-podge of decisions," reflecting "the lack of principled decisionmaking on this

issue." Petition, at 12-13. Both of these assertions are incorrect.[10]

A. Great Western Has Misread *Moor*.

This case and *Moor* concern different rules. The present case concerns the rule of *Wyoming Highway Commission* that a state agency acting as an arm of the State is not a citizen of the State, while *Moor v. County of Alameda* concerned the rule of *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869), that local governmental units such as counties and municipalities are citizens of their States.[11]

In *Moor*, the Court examined the status of counties under California law and found no reason to exempt the counties of that State from the ordinary rule that local governmental units are subject to federal diversity jurisdiction. *Moor* reversed the decision of the Court of Appeals for the Ninth Circuit, which had bestowed on the counties of California an exemption from federal diversity jurisdiction. This Court held that *Cowles v. Mercer County* applies in California, just as it applies everywhere else in the nation. *Id.* at 721.

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[10] Great Western does not try to demonstrate any conflict between the Sixth Circuit's decision in this case and any other lower court decision. The court of appeals' decision was consistent with *Dupont v. South Carolina Public Service Authority*, 100 F. Supp. 778 (E.D.S.C. 1951).

[11] The difference in treatment accorded local and state governments grows out of the tradition since colonial times that municipalities are "natural persons for virtually all purposes of constitutional and statutory analysis." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 638-39 (1980).

The present case involves a different issue, namely whether a state agency is an "arm of the state." The district court and court of appeals examined the factors that are relevant to determining the extent of SCPSA's intertwining with the State. It should be no surprise that somewhat different factors are controlling in this case from those in *Moor*, given that *Moor* involved a county and this case involves a state agency. That different factors are relevant is no reason for granting certiorari.

Great Western, however, seems to find two universal tests in the Court's opinion in *Moor*, and implies that one or the other of these should govern not only a case like *Moor*, involving an issue of whether the counties of a particular state should be exempted from the rule of *Mercer County*, but also the entirely different issue of whether a state agency is an arm of the State under *Wyoming Highway Commission*.

Great Western first reads *Moor* to hold that "an entity's corporate status [is] determinative." Petition, at 7. One page later, however, Great Western implies that *Moor* established a 10-factor test, of which corporate status is merely one, Petition, at 8, and criticizes the Sixth Circuit for not finding SCPSA independent of the State under these 10 factors. Petition at 9-11.

In reality, *Moor* established neither of these "tests." *Moor* did not hold "corporate status" to be "determinative" of anything – not even the issue in that case. *Moor* noted only that the "original basis" for the ruling in *Mercer County* that counties were subject to diversity jurisdiction was an analogy between the county board of supervisors and a private corporation. 411 U.S. at 718. If

corporate status had been determinative, the Court in *Moor* would not have gone on to examine an array of 10 factors.

Great Western's alternative reading, that *Moor* established a 10-point universal test of whether any entity is an arm of the State, is equally inaccurate. In *Moor*, the Court simply identified the factors that were especially relevant in the context of that particular case. The lower courts in the present case did the same. There is no conflict between *Moor* and the decision of the lower courts in this case.[12]

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[12] Great Western seemingly would require the federal courts to disregard any factor not listed in *Moor*. Judge Siler cited several factors, not mentioned in *Moor* because they were not relevant to that case, but all showing the political and financial intertwining of SCPSA with the State. To require that these factors be ignored would be illogical.

Even Great Western's application of the 10 factors from *Moor* is erroneous. Most importantly, Great Western characterizes SCPSA as "essentially local," Petition, at 9, but SCPSA and the public services that it provides are state-wide. Pp. 7-9, *supra*. Moreover, Great Western has ignored the fact that SCPSA's net earnings go to the state's general funds "to reduce the tax burdens on the people of this State." S.C. Code § 58-31-110. The legislature also has placed substantial limits, which Great Western does not mention, on SCPSA's power to acquire or dispose of assets. S.C. Code §§ 58-31-30, 58-31-50; *see Creech v. South Carolina Public Service Authority*, 200 S.C. 127, 20 S.E.2d 645 (1942) (SCPSA is not empowered to acquire existing utility). Further, SCPSA's power to sue and be sued is limited by sovereign immunity, *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132 (1950), whose scope is now set by the South Carolina Tort Claims Act. S.C. Code §§ 15-78-10 *et seq.*

B. There Is No Need for Guidance to the Lower Courts on Applying *Wyoming Highway Commission*.

Great Western presents two long string-cites of cases. One set of cases finds certain state entities to be arms of their respective States, and the other set finds "functionally similar entities" not to be. Great Western then pronounces that "[t]hese decisions cannot be reconciled." *Id.* On more than cursory examination, however, all of this alleged irreconcilability, with the exception of two cases,[13] shows only that the lower federal courts have reached different results on different facts.

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[13] Great Western cites *State ex rel. Guste v. Home Depot, Inc.*, 589 F. Supp. 1254 (E.D. La. 1984), holding that the Louisiana Department of Urban and Community Affairs ("DUCA") was an arm of the State, and *State ex rel. Guste v. The Fedders Corp.*, 524 F. Supp. 552 (M.D. La. 1981), holding the contrary. In both of those cases, the DUCA brought enforcement actions in state court under state unfair trade practice and consumer protection laws. The defendants then removed the cases to federal court, alleging diversity, and the DUCA moved to remand.

As the 1984 *Home Depot* decision explained, *Fedders Corp.* in 1981 erroneously treated as determinative the fact that the DUCA was designated a "body corporate," a classification that included some 20 Louisiana executive agencies. 589 F. Supp. at 1256. The Fifth Circuit's 1983 decision in *Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), then emphasized the need for a more rounded analysis of an entity's nature and its mission under state law. After *Tradigrain* was decided, the Middle District of Louisiana evidently abandoned *Fedders Corp.*, in *Kurkiewicz v. State*, 560 F. Supp. 911 (M.D. La. 1983). For at least the past nine years, the decisions within the Fifth Circuit have been in harmony.

For example, Great Western cites both *Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), and *Indiana Port Comm'n v. Bethlehem Steel Corp.*, 702 F.2d 107 (7th Cir. 1983). Those decisions are consistent. Both followed this Court's instruction that the courts must look to "the nature of the entity created by state law." *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).[14] In *Mississippi State Port Authority*, the Fifth Circuit examined state statutory and decisional law and concluded "that the legislature considered the Authority an alter ego of the State." 701 F.2d at 1133. In *Indiana Port Comm'n*, the court also analyzed state law, but the analysis yielded a different result. The Seventh Circuit found that, under the law of Indiana, the Port Commission was " 'separate from the state,' " and was " 'not the state in its sovereign corporate capacity.' " 702 F.2d at 109 (quoting Indiana Supreme Court). The salient point is not, as Great Western would have it, that the courts reached different results, but that they did so through a consistent analysis – both looked to state law. Judge Siler's analysis also was consistent, for, as he noted, South Carolina law has declared that SCPSA "is completely identified with the State . . . . " *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 138-39 (1950). *See* n.5, *supra*.

Great Western has failed to show how any new instructions from this Court could usefully clarify the

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[14] *See also Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982) (stressing "the importance of state law").

multi-factor "arm of the State" test, or why such clarification is needed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 7, 1992.

Respectfully submitted,

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APPENDIX A

AFFIDAVIT OF CARROLL A. CAMPBELL, JR.

PERSONALLY appeared before me, CARROLL A. CAMPBELL, JR., who, being first duly sworn, deposes and says:

1. I am Governor of the State of South Carolina and, in that capacity, serve on the advisory board to the South Carolina Public Service Authority (Santee Cooper).

2. Santee Cooper is an instrument and arm of the State of South Carolina, and it serves essential public functions. Its provision of electrical power is such a function, but the Statewide public purposes that it serves do not end there.

3. Among other things, Santee Cooper assures navigation along the Santee and Cooper Rivers between Charleston and Columbia, South Carolina, and thereby fosters commerce between the two principal cities of the State; it is responsible for flood control along South Carolina waterways; it conducts State reforestation programs; it develops and maintains State recreational facilities; it undertakes State land reclamation projects; and it participates in the management of State wildlife programs. In all of these undertakings, Santee Cooper performs critical State functions that would otherwise be performed by other State departments or agencies, if the State were able to perform them at all.

4. The Governor of the State appoints the members of the Board of Directors of Santee Cooper, subject to the advice and consent of the Senate.

5. By law, five constitutional State officers constitute Santee Cooper's Advisory Board, namely: the Governor,

the Attorney General, the State Treasurer, the Comptroller General and the Secretary of State. The Advisory Board provides advice and support to Santee Cooper. In addition, Santee Cooper's Directors must report to the Advisory Board annually on the operations and finances of the agency. The Advisory Board is required each year to appoint an accountant or accounting firm to conduct a complete audit of the affairs of Santee Cooper.

6. As Governor, I must report annually to the South Carolina General Assembly concerning the work and finances of Santee Cooper, and I must provide the legislature with the audit that the Advisory Board has commissioned.

7. Santee Cooper's operations and finances are interconnected with the finances of the State generally. Earnings from Santee Cooper's operations are paid into the State Treasury semi-annually and are handled, like other State revenues, within the State's budgeting processes.

8. In order to achieve a balanced budget, the State must assure that appropriations do not exceed overall revenues. Consequently, reductions in revenues from Santee Cooper would either mean a corresponding reduction in the State's ability to appropriate, or would require an increase in revenues from other sources.

9. Santee Cooper is included within the annual State of South Carolina Financial Statement because Santee Cooper is integral to the State itself. The Notes to the most recent State Financial Statement (Attachment A hereto) indicate the criteria by which Santee Cooper was included. Note 1.a. states (emphasis supplied):

These financial statements include all component units over which the State's elected officials exercise significant oversight responsibility. *Financial interdependency is the most important element of oversight responsibility.* However, the following also were considered in determining the scope of the reporting entity:

Selection of governing authority
Designation of management
Ability to significantly influence operations
Accountability for fiscal matters

Note 15 enumerates important State organizations and foundations that, by application of these criteria, despite their importance were *not* included within the State Financial Statement.

10. For these reasons, among others, Santee Cooper performs functions of the State of South Carolina, and its operations and finances cannot be severed from those of the State itself. Indeed, its work and its finances are those of the State.

Subscribed and sworn to
before me this 15th
day of January, A.D. 1991.

/s/
CARROLL A. CAMPBELL, JR.

/s/ (SEAL)
NOTARY PUBLIC FOR
SOUTH CAROLINA
My Commission expires 3-21-95.

[ATTACHMENT A OMITTED]